Ng Pak Cheong v Global Insurance Co Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 40 OF 1980
MOHAMED DZAIDDIN FCJ
14 OCTOBER 1994

Contract — *Specific performance — Purchase of company assets by director — Whether contract enforceable if entered into in contravention of s 27(2) of Insurance Act 1963 — Whether specific performance can be granted where contract is tainted with fraud or misrepresentation — Insurance Act 1963 s 27(2)*

Companies and Corporations — *Directors — Fiduciary duties — Breach by appropriation of company's assets*

Words and Phrases — *'Disposal' — Insurance Act 1963 s 27(2)*

This action was for specific performance of an agreement dated 27 July 1977 ('the agreement') made between the defendant and the plaintiff's father, Ng Siau Choon ('the deceased'), who was at the material time the chairman and principal officer of the defendant. Under the agreement, the defendant agreed to sell to the deceased certain of its assets and properties for RM1,669,220. The deceased paid RM166,922 as a deposit and went into possession of the properties. At the time, however, the defendant was under investigation by the Director General of Insurance ('the DGI') on the ground that it was likely to be insolvent and the DGI had directed that none of its assets was to be disposed of without his prior written permission under s 27(2) of the Insurance Act 1963 ('the Act'). The defendant contended that the agreement was void and unenforceable and was a fraud designed to strip its assets, and that the deposit had been paid as a round robin transaction in which money was drawn from the defendant's account and paid to the deceased's account, and subsequently withdrawn and paid to the defendant. The defendant counterclaimed for vacant possession of its properties and damages.

Held, dismissing the plaintiff's claim and allowing the defendant's counterclaim:

(1) The evidence was clear that the agreement was signed without the approval of the DGI and, more importantly, that the deceased did not comply with the directives regarding the offer for sale to be made first to the public by publishing advertisements in the local newspapers.

(2) By the terms of the agreement, the deceased had sought to circumvent the DGI's directives and s 27(2). The agreement conferred upon the deceased full rights of immediate possession and a permanent right to occupy the properties which gave the deceased all rights over the properties as if he had completed the purchase. That amounted to the deceased having effectively procured the 'disposal of' the properties without the approval of

A the DGI because of the legal and equitable rights which the agreement intended to vest in the deceased.

(3) Specific performance will be refused where the contract is tainted with fraud, or where the plaintiff has made some positive misrepresentation or been guilty of fraudulent suppression or where the conditions for sale are misleading. The agreement was tainted with fraud and was, therefore, void and unenforceable against the defendant. The plaintiff's alternative claim for damages in lieu of specific performance was also dismissed.

(4) The deceased was in breach of his fiduciary duties as a director of the defendant by using the agreement as a device to appropriate the assets of the defendant to himself.

(5) The plaintiff had no defence to the defendant's counterclaim and as the agreement was void, the defendant was entitled to immediate vacant possession of the properties, damages to be assessed by the registrar and costs of the counterclaim.

D

[**Bahasa Malaysia summary**

Tindakan ini adalah untuk mendapat pelaksanaan spesifik suatu perjanjian yang bertarikh 27 Julai 1977 ('perjanjian itu') yang telah diikat di antara defendan dan bapa plaintif, Ng Siau Choon ('si mati'), yang pada masa yang berkenaan merupakan pengerusi dan pegawai utama defendan. Di bawah perjanjian itu, defendan telah bersetuju menjual kepada si mati beberapa aset dan hartanya yang tertentu bagi jumlah RM1,669,220. Si mati telah membayar RM166,922 sebagai deposit dan menduduki harta tersebut. Bagaimanapun, pada masa itu, defendan sedang disiasat oleh Ketua Pengarah Insuran ('KPI') atas dasar bahawa ia mungkin menjadi tidak solven dan KPI telah mengarahkan supaya asetnya tidak boleh dijual tanpa mendapatkan kebenaran bertulis beliau terlebih dahulu di bawah s 27(2) Akta Insuran 1963 ('Akta itu'). Defendan menegaskan bahawa perjanjian itu tidak sah dan tidak boleh dikuatkuasakan dan adalah suatu fraud yang direka untuk melucutkan asetnya, dan bahawa deposit itu telah dibayar sebagai suatu transaksi 'round robin' di mana wang telah dikeluarkan daripada akaun defendan dan dibayar ke dalam akaun si mati, dan kemudiannya dikeluarkan dan di bayar kepada defendan. Defendan telah membuat tuntutan balas untuk mendapatkan milikan kosong hartanya dan ganti rugi.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan:

(1) Keterangan adalah jelas bahawa perjanjian itu telah ditandatangani tanpa kelulusan KPI dan, lebih penting lagi, bahawa si mati tidak mematuhi arahan supaya tawaran jualan mesti dibuat terlebih dahulu kepada orang awam dengan menerbitkan iklan di dalam surat khabar tempatan.

(2) Melalui terma perjanjian itu, si mati telah mencuba memintasi arahan KPI dan s 27(2). Perjanjian itu telah memberikan si mati hak penuh untuk mendapatkan milikan segera dan suatu hak kekal untuk menduduki harta tersebut yang memberikan si mati kesemua hak ke atas harta tersebut seolah-olah beliau telah menyelesaikan belian itu. Itu bererti si mati telah memperolehi 'jualan' harta itu tanpa kelulusan KPI akibat hak di sisi undang-undang dan ekuiti yang perjanjian itu bertujuan meletakhak di dalam si mati.

(3) Pelaksanaan spesifik tidak akan diberikan di mana kontrak itu dicemar oleh fraud, atau di mana plaintif telah membuat suatu salah nyata positif atau melakukan penyekatan secara fraud atau di mana syarat jualan itu mengelirukan. Perjanjian itu telah dicemar oleh fraud dan oleh itu adalah tidak sah dan tidak boleh dikuatkuasakan terhadap defendan. Tuntutan alternatif plaintif untuk ganti rugi sebagai ganti pelaksanaan spesifik juga ditolak.

(4) Si mati telah memungkiri kewajipan fidusiarinya sebagai seorang pengarah defendan dengan menggunakan perjanjian itu sebagai suatu alat untuk mencedok aset defendan kepada dirinya sendiri.

(5) Plaintif tidak mempunyai pembelaan terhadap tuntutan balas defendan dan oleh kerana perjanjian itu tidak sah, defendan berhak mendapatkan milikan harta itu dengan segera, ganti rugi yang akan ditaksirkan oleh pendaftar dan kos tuntutan balas itu.]

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No P–02–238–94.]

Notes

For a case on the construction of the word 'disposal', see *Malayan Law Journal Words and Phrases Judicially Defined* (1990) at p 176.
For cases on specific performance, see *Mallal's Digest* (4th Ed, Reissue) paras 2157–2177.
For cases on breach of directors' fiduciary duties, see *Mallal's Digest* (4th Ed, Reissue) paras 85–92.

Cases referred to

Australian Growth Resources Corp Pty Ltd v Van Reesema (1988) 13 ACLR 261 (folld)
Carter v Carter [1896] 1 Ch 62 (refd)
Chong Kon Fah v Yong Siau [1983] 1 MLJ 271 (refd)
Cook v Deeks [1916] 1 AC 554 (folld)
Narayanan v Official Assignee, Rangoon AIR 1941 PC 93 (refd)
Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134; [1942] 1 All ER 378 (folld)
Saminathan v Pappa [1981] 1 MLJ 121 (refd)
Shell (Malaysia) Trading Sdn Bhd v Lim Yee Teck & Ors [1982] 2 MLJ 181 (refd)
Spedley Securities Ltd (In Liquidation) v Greater Pacific Investments Pty Ltd (In Liquidation) (1992) 7 ACSR 155 (folld)

Sumitomo Bank Ltd v Kartika Ratna Thahir & Ors and another matter [1993] 1 SLR 735 (HC); [1994] 3 SLR 257 (CA) (folld)
Tamplin v James (1880) 15 Ch D 215; [1874–80] All ER Rep 560 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Insurance Act 1963 s 27(2)

AKJ D'Cruz (*AKJ D'Cruz & Co*) for the plaintiff.
CV Das (*Anthony Leong* with him) (*Tetuan Riza Leong & Partners*) for the defendant.

Mohamed Dzaiddin J: This is an action for specific performance of an agreement dated 27 July 1977 ('the said agreement') made between the defendant, formerly known as Sovereign General Insurance Sdn Bhd, and Ng Siau Choon ('the deceased'), who was at the material time the chairman and the principal officer of the defendant. Under the said agreement and for the consideration of RM1,669,220, the defendant agreed to sell and the deceased to purchase the following assets and properties of the defendant:

(a) 20,000 shares of RM1 each in Auto Electronic Sdn Bhd;
(b) Lot 510, Section 67, Town of Kuala Lumpur, together with the premises thereon known as No 247, Jalan Bukit Bintang, Kuala Lumpur;
(c) Lots 1283 and 1285, Section 46, Town of Kuala Lumpur, together with two uncompleted buildings erected thereon;
(d) Lots 107, 115 and 116, Town Area XX, Melaka, together with the premises erected thereon and known as No 55–A, 55–D, Jalan Bendahara Melaka;
(e) Lots 26 and 27 Pulau Sebang, District of Alor Gajah, Melaka, together with the premises erected thereon and known as Nos 2003 and 2004, Main Road, Pulau Sebang, Melaka; and
(f) Lots 278 and 279, Town Areas VIII, Melaka.

This action was commenced by the deceased, but on his death on 8 January 1984, his son, Ng Pak Cheong, was substituted as the plaintiff by order of court of 30 March 1987.

By the statement of claim dated 30 March 1980, the plaintiff alleged as follows:

(a) that he had paid to the defendant the sum of RM586,922 toward the purchase price, leaving a balance of RM1,082,298, and upon signing of the said agreement, he had taken over possession of the said properties;
(b) that under cl 5 of the said agreement, the defendant was to take necessary action to obtain the approval and/or consent of the Director General of Insurance ('the DGI') for the sale of its assets and properties to the plaintiff in view of the fact that the said sale and

transfer was subject to the consent of the DGI being granted on or before 31 January 1978; A

(c) the defendant also agreed to give its full co-operation and assistance to the DGI for the latter to carry out an investigation into its affairs, following the issuing of a notice by the DGI to the defendant that it should not dispose of its assets and properties without the DGI's prior approval since the DGI's investigations were still pending; B

(d) that the defendant had agreed to execute the transfer of the first three above-mentioned properties to the plaintiff on or before 31 January 1978 for a total consideration of RM395,000; and

(e) on 10 August 1979, the plaintiff's solicitors wrote to the defendant demanding the latter to comply with the terms of the said agreement. Despite receipt of the said demand letter, the defendant had failed or neglected to carry out its obligations under the said agreement. C

Wherefore, the plaintiff claimed for an order for specific performance of the said agreement; alternatively, damages in lieu thereof. D

By an amended defence and counterclaim dated 12 March 1981, the defendant contended that the said agreement was void and unenforceable in law because the purported sale of the defendant's properties was in contravention of the directives of the DGI and s 27(2) of the Insurance Act 1963 ('the Act'). Secondly, the defendant alleged that the said agreement was a fraud on the defendant since it was a product of an asset-stripping operation designed to defraud the creditors and its insured. Further and/or in the alternative, the defendant alleged that the deceased had been in breach of fiduciary duty by purporting to purchase the defendant's properties for himself to the detriment of the defendant's shareholders and insured. By the counterclaim, the defendant prayed for a declaration that the said agreement was illegal, null and void for reasons pleaded in the amended defence, and for an order of vacant possession of the defendant's properties, damages for trespass and unlawful occupation of the said properties and costs. E F

At the outset, it should be mentioned that this case has had a chequered history right from day one and which had taken more than ten years to complete. Due to some unexplained reasons, perhaps no one should be blamed for the delay. Be that as it may, we should not lose sight of the main issues in the case which, although it would appear to be a straightforward claim for specific performance, but due to the passage of time and the untimely death of the deceased, reliance will have to be placed on the documents in the agreed bundle. In this regard, I should, perhaps, state that in coming to my decision, I have been guided and assisted by the written submissions of both counsel for which I deeply appreciated. G H

Generally, in an action for specific performance of a contract, a plaintiff must allege in the statement of claim, inter alia, that he has provided valuable consideration; that all conditions precedent have been performed and that he has done, or is ready and willing to perform as much towards completion of the said agreement. See 37 *Atkin's Court* I

A *Forms* (2nd Ed) at p 25. The fact that these allegations have been raised by the plaintiff in the pleadings are not disputed. In fact, the plaintiff had stressed the fact that the deceased had paid the defendant the sum of RM166,922 being 10% of the purchase price under the said agreement. As for the defence, any defence which establishes that there is no contract between the parties at law is a complete defence to an action for specific performance, except where a defendant establishes a valid defence without otherwise impeaching the validity of the contract, then a plaintiff can be awarded damages in lieu of specific performance (*Tamplin v James* (1880) 15 Ch D 215; [1874–80] All ER Rep 560, CA). In the present case, the main thrust of the defence is that there is no contract between the parties at law and equity because the said agreement is void and unenforceable on two principal grounds. First, it is alleged that the deceased was precluded by law from disposing the defendant's assets and properties without the approval of the DGI. Secondly, the said agreement is a product of a fraudulent scheme designed to defraud the company, its creditors and shareholders. Therefore, my approach in deciding this case will be to consider the two principal grounds of defence by answering the two questions which I have formulated below.

(a) *Does the said agreement contravene the DGI's express directives and s 27(2) of the Act?*

On 12 September 1974, the DGI served notice on the defendant under s 27 of the Act to show cause why an investigation should not be instituted into the affairs of the defendant on the ground that it is or is likely to become unable to meet its obligations. By the said notice, it was implicit for the defendant and also for the deceased, as the principal officer of the defendant, not to do anything which would affect the assets of the defendant and further jeopardize the defendant's perceived state of insolvency. Section 27(2) stipulates that before the completion of any investigation under the section, the insurer shall not under any circumstances, save with the prior written approval of the DGI, dispose of any assets vested in or accruing to the insurer. It appeared that despite the said notice of 12 September 1974, the deceased had entered into an agreement with Siang Yong Enterprises Sdn Bhd to sell the majority stake of the Ng family in the defendant to Siang Yong, and in return, he was to purchase all the then assets of the defendant. See the minutes of the board meeting held on 24 November 1975. The above arrangement was reduced into a formal agreement dated 7 December 1975. It is of some significance to note that this purported agreement was undertaken at the time when the defendant was under investigation by the DGI. It is also not in dispute that the properties which are the subject of this agreement had not been offered for sale to the existing shareholders of the defendant.

By a letter of 9 July 1976, the DGI wrote to the deceased, seeking clarification regarding the defendant's outstanding claims which remained unsettled. Then, by a letter of 7 August 1976, the deceased was told, in no uncertain terms, not to dispose of any assets vested in or accruing to the defendant under any circumstances, save with the prior written approval

of the DGI. The letter further stated that the earlier approval given to sell some of the defendant's properties in order to improve its liquidity position was withdrawn.

It would appear that arising from this stern letter from the DGI, at a board meeting of the defendant on 21 January 1977, when certain important decisions regarding the disposal of the defendant's assets were made, it was stressed that any such sale or disposal must be subject to the approval of the DGI.

On 24 June 1977, the DGI had a lengthy discussion with the deceased over the affairs of the defendant. Following this meeting, a letter dated 27 June (AB78) was sent to the deceased setting out the outcome of the discussion. It stated:

> The Director General of Insurance expressed that the fixed assets of the company should be sold at realistic market values. In this regard, he requested that the sale of the fixed assets be advertised in *Berita Harian, New Straits Times* and *Nanyang Siang Pau* with three insertions. If there is no response from buyers within 45 days from the date of the last insertion, then the properties may be sold to any buyer for a consideration of RM1,628,000. Mr Sault Keith Sellar also undertook to send copies of the notice of advertisement to the Director General for his approval. Details of responses to the advertisements should be transmitted promptly to the Director General of Insurance upon receipt.

The letter concluded:

> I would like to have a progress report from the company every quarter on the implementation of the above measures. I shall also not hesitate to make on the spot checks on the company to observe compliance with these measures and directives.

In what appeared to be in purported compliance with the DGI's directives, the plaintiff's former solicitors, Messrs Sault Keith Sellar & Co, wrote to the DGI on 26 June 1977, enclosing a copy of the draft advertisement of an offer for sale for insertions in the local newspapers. It is evident that the DGI was insistent that the advertisements be carried out and details of responses be transmitted to him. He even made amendments to the draft advertisements in his reply to the solicitors dated 4 July 1977. Therefore, it became obvious that as a result of the deceased having failed to transmit to the DGI details of responses to the advertisements pertaining to the proposed sale of the said properties, the DGI by a letter dated 21 March 1978 (AB107) revoked his earlier approval to sell the properties under the three conditions. Thus, by 1 August 1977, the Ng family lost control of the defendant when the Siang Yong directors sold their stake to another group.

It is the plaintiff's case that the investigation by the DGI was not a bar to the parties entering into the said agreement to sell the said properties. The plaintiff's counsel had stressed that the only condition precedent was to obtain the written approval of the DGI and so long as the price exceeded RM1,628,000, the DGI would have no objection to the sale of the said properties. Lastly, it was suggested that the decision to sell the

said properties was not objectionable to the DGI. With respect, I do not accept this submission as correct. As regards the sale of the said properties, it is beyond dispute that the said sale must be subject to the conditions imposed by the DGI. The evidence is clear, indeed it was confirmed by PW1 himself, that the said agreement was signed without the approval of the DGI and, more importantly, that the deceased did not comply with the directives regarding the offer for sale to be made first to the public by publishing advertisements in the local newspapers. Secondly, in the light of the letter of 26 June 1977 from Messrs Sault Keith Sellar & Co, where the last part of the said letter categorically stated that 'we are acting for the company in this matter and not for him (Mr Ng) personally', I find no merit in counsel's submission that it was the duty of the defendant to apply for the DGI's consent or to show to the court what steps were taken to obtain the DGI's consent, relying on *Shell (M) Trading Sdn Bhd v Lim Yee Teck & Ors* [1982] 2 MLJ 181 and *Chong Kon Fah v Yong Siau* [1983] 1 MLJ 271.

In my judgment, the deceased had contravened the express directives of the DGI issued pursuant to s 27(2) of the Act. In the first place, the DGI's directives as regards the advertisement in the local newspapers of the proposed sale of the said properties were expressly violated by the plaintiff. In the face of this violation and the subsequent revocation of the DGI's conditional consent, the deceased went on to enter into the said agreement and occupied as lessee some of the defendant's properties. It must be remembered that shortly before the said agreement was signed, which on evidence was executed without the DGI's knowledge and approval, the DGI had held a discussion with the deceased regarding the sale of the assets of the company and had expressly directed that the sale be first offered to the public by advertisement in the local newspapers.

Secondly, it is clear to me that by the terms of the said agreement, the deceased had sought to circumvent the DGI's directives and s 27(2). The section requires prior written approval of the DGI for any disposal of the properties of the defendant. The fact that the said agreement purports to make such an approval a condition does not alter the picture because the approval is only for the purpose of effecting a transfer for registration purposes. The important feature is that the said agreement otherwise confers upon the deceased full rights of immediate possession and a permanent right to occupy the said properties which is to survive the said agreement itself. This is to give the deceased all rights over the properties as if he had completed the purchase. This would amount to the deceased having effectively procured the 'disposal' of the said properties without the approval of the DGI within the meaning of s 27(2). In *Carter v Carter* [1896] 1 Ch 62 at p 67, Stirling J said that the words 'dispose' and 'disposition' are not technical words 'but ordinary English words of wide meaning; and where not limited by the context those words are sufficient to extend to all acts by which a new interest (legal or equitable) in the property is effectually created'. It cannot be disputed that by the said agreement, the deceased had intended to obtain legal rights to possess and use the said properties which was to prevail over any decision of the DGI

under s 27(2). In my view, the said agreement does amount to a 'disposal' of the assets without the prior approval of the DGI because of the legal and equitable rights it was intended to vest in the deceased.

Finally, I desire to make one observation regarding the non-calling of the DGI, in the person of Encik Bhupinder Singh, as a witness for the defendant. Counsel for the plaintiff had suggested that failure to call the DGI attracted an adverse inference against the defendant under s 114(g) of the Evidence Act 1950. It was stressed that the defendant should have called the DGI to establish that the plaintiff had acted in contravention of s 27(2) of the Act and that his evidence was essential to prove the allegations that the plaintiff had practised deception on the DGI and sought to obstruct the DGI's investigations. Based on the relevant correspondences, which had been exhibited in the agreed bundle and produced before me and from the evidence of PW1 himself, I am satisfied that the defendant has shown that the deceased had contravened the DGI's directives without the necessity of the defendant calling the DGI to testify in court.

For the above reasons, I hold that the defendant has succeeded in showing that the said agreement contravened the express directives of the DGI and that the plaintiff had gone against the provision of s 27(2) of the Act. Accordingly, the said agreement is unenforceable against the defendant.

(b) *Is the purported sale of the said properties under the said agreement designed to defraud the defendant, its creditors and insured and therefore illegal?*

It must be remembered that fraud as a defence includes not only misrepresentation when fraudulent, but also all other unconscionable and deceptive dealing of either party to a contract (*Fry on Specific Performance* (6th Ed) at p 330). In the present case, the defendant had raised in the amended defence allegations of fraud, conspiracy and breach of fiduciary duties on the part of the deceased who was, at the material time, the defendant's chairman and the principal officer. I note that Encik D'Cruz, the plaintiff's counsel, has rightly submitted that under the law of evidence, the burden lies on the defendant to prove fraud beyond reasonable doubt, citing *Saminathan v Pappa* [1981] 1 MLJ 121 at p 126, where the Privy Council had held that in Malaysia, the standard of proof for fraud in civil cases is proof beyond reasonable doubt. It would seem to me that Lord Diplock followed Suffian LP in the Federal Court who stated at p 123 that:

> As regards fraud, the defendant must prove it not on a balance of probabilities but beyond reasonable doubt: see the Privy Council case of *Narayanan v Official Assignee, Rangoon* AIR 1941 PC 93.

In *Narayanan v Official Assignee, Rangoon* AIR 1941 PC 93, the Privy Council held that fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture.

A In the famous Singapore case of *Sumitomo Bank Ltd v Kartika Ratna Thahir & Ors and another matter* [1993] 1 SLR 735, Lai Kew Chai J, in dealing with the burden of proof for allegations of a fraudulent or criminal nature in civil cases, held, allowing a substantial part of Pertamina's claim, that the legal and evidential burden of proof that Pertamina had paid Siemens and Klockner rested with Pertamina. Whilst it was necessary for B Pertamina to prove their case to a higher standard than that required in a non-fraud case (there being allegations of a fraudulent or criminal nature), it is not the law of evidence that every step in the allegation of fraud has to be proved by calling live and admissible evidence, nor is it the law that fraud cannot be inferred in the appropriate case. The inference, however, C should not be made lightly; the circumstantial evidence must be so compelling and convincing that, bearing in mind the high standard of proof, the inference is nevertheless justified. This decision was later affirmed by the Singapore Court of Appeal in August 1994. [See [1994] 3 SLR 257.]

D Therefore, following the above statement of principle, it is necessary for me, in the present case, to examine and consider the evidence, if any and the circumstances of the various transactions of the parties to enable me to come to any conclusion whether an allegation of fraud, in the sense of an unconscionable and deceptive dealing (*Fry on Specific Performance*), by the deceased has been satisfactorily established. Indeed, Encik Cyrus E Das, counsel for the defendant, in his written submission, has invited me to examine and consider the various documentary evidence which were agreed and admitted as the agreed bundle, including D10, as well as the admission of PW1 in his oral evidence, which no doubt would assist me in this exercise.

F Thus, going back to the question which I posed above, two important transactions call for consideration, namely, the purported sale of the Ng family's stake in the defendant to Siang Yong Enterprises Sdn Bhd and in return for the deceased to purchase all the assets of the defendant, and the round robin transaction involving funds from the defendant's account and the personal account of the deceased maintained at the Pudu branch of G Malayan Banking Bhd.

With regard to the Siang Yong agreement, the evidence showed that in November 1975, the deceased entered into an arrangement with Messrs Siang Yong Enterprise Sdn Bhd to sell the majority stake of the Ng family in the defendant to Siang Yong and, in return, for him to purchase H all the then assets of the defendant. This is apparent from the minutes of the board meeting held on 24 November 1975 when, inter alia, a decision was taken to sell the defendant's properties and at the same time to appoint two of the promoters of Siang Yong Enterprise on to the board with effect from 1 December 1975. By an agreement dated 7 December 1975 ('the Siang Yong agreement') (AB8) between the deceased (described I as the vendor) on one side, and Koek Cheng Koi @ Koi Chin Kooi and Tan Chong Kek @ Tan Choon Seak of Siang Yong Enterprise of the other side (described as the purchasers), the deceased agreed to sell and Siang Yong to purchase all the shares in the defendant owned by the Ng family comprising 540,000 shares at RM1 each for the total consideration of

RM810,000 and, in return, for Siang Yong to sell the said properties of the defendant listed in cl 3 of the agreement (of which the defendant was the registered proprietor) for the total consideration of RM1,669,220. The terms of the Siang Yong agreement as to how the respective purchase prices (one for the sale of the shares to Siang Yong, and the other of the sale of the defendant's properties to the deceased) were to be paid for showed as follows:

(a) by cl 3(a), an initial sum of RM81,000 was to be paid by Siang Yong to the deceased for the shares;

(b) by cl 4, the balance purchase price for the said shares was to be paid by nine monthly instalments; and

(c) by cl 10, the second instalment onwards of the balance purchase price was to be paid directly to the defendant to the account of the purchase price for the said properties.

I pause to observe that from the above Siang Yong agreement, the deceased was to purchase the said properties of the defendant from the proceeds of the sale of his shares to Siang Yong. In short, company shares were being exchanged for company assets.

At a board meeting of the defendant on 7 December 1975, comprising members of the Ng family, including the deceased and the new Siang Yong directors, it was, inter alia, sought to fix the minimum purchase price of the said properties at RM1,669,220 and for all offers to purchase from existing shareholders to be tendered with 10% of the purchase price on or before 15 December 1975. By a circular dated 8 December 1975, the secretary of the defendant purported to inform existing shareholders of the decision of the board to sell the fixed assets and their entitlement to bid for them, and of the terms of the sale. It will be noticed that the said circular was issued one day after the Siang Yong agreement, in which case the deceased had already purported to purchase the said assets for himself. By a letter dated 15 December 1975, in alleged response to the said circular, the deceased purported to submit his bid enclosing an MBB cheque No 456846 for RM166,922 being 10% deposit for the said assets and proposing different dates for settlement of the balance purchase price for the respective properties. He concluded the said letter with these words: 'I sincerely hope that the above proposals will be acceptable by the company'.

At or about the same time, there was a considerable movement of funds involving the defendant's account at Malayan Banking Bhd, Pudu branch (Account No 5–401) and the personal account of the deceased maintained at the same branch (Account No 4–255). I shall highlight and discuss these transactions shortly.

At the board meeting of 20 December 1975, where the deceased and the Ng family directors were again in the majority, the board purported to accept the offer to purchase by the deceased together with his alleged deposit amount on the terms and conditions proposed by him. Further, the board directed that the defendant enter into an agreement of sale with him. However, the defendant did not enter into any immediate sale agreement with the deceased. Instead, at the board meeting of 9 July 1976,

A the board purported to accept the proposal of the deceased by his letter dated 9 July 1976 to advance the dates of completion for purchase of two of the properties, being Lot 510 (s 67) and Lots 1283–1285 (s 46) in Kuala Lumpur, and then purported to resolve that the said Lot 510 'is hereby sold to Mr Ng Siau Choon for a consideration of RM125,000'. No reason was given by the deceased as to why he wanted the dates for completion of the purchase to be advanced in respect of the above-mentioned properties, nor was any explanation advanced at the trial. However, it would seem that at the material time, the deceased was under pressure from the DGI in respect of the investigation into the affairs of the company. Thus, by a letter also dated 9 July 1976, the DGI sought a response from the defendant on the outstanding claims remaining unsettled.

This was followed by a letter dated 7 August 1976 addressed to the deceased, wherein it was categorically stated:

> ... (Y)ou are not allowed to dispose of any assets vested in or accruing to your company under any circumstances save with the prior approval of the Director General of Insurance. This is in accordance with s 27(2) of the above Act as amended by the Insurance (Amendment) Act 1975. Our earlier approval given to you to sell some of your properties to improve your liquidity position is hereby withdrawn.

At the board meeting of 21 December 1976, where again the Ng family directors were in the majority (Mdm Yee Seh Poi, being the wife of the deceased), it was decided to transfer to the deceased on or before 31 January 1977, subject to the approval of the DGI, three of the said properties, namely, Lot 510, Lots 1283–1285, and the shares in a company called Auto Electronic Centre Sdn Bhd. Again, no reason was given as to why there was this urgency to transfer the said properties before 31 January 1977. But it would appear that some of the directors, who were not from the Ng family, were by this time uneasy about the decision to sell or transfer the assets of the defendant to the deceased. Thus, at the board meeting held on 11 January 1977, the earlier resolution to transfer the said assets to the deceased was deleted, and one of the directors, one Mr Lai Ah Thiam expressly queried whether the agreement would not contravene the instructions of the DGI since investigations were still pending. The minutes, however, showed that he was assured that the deceased had consulted the solicitor, Mr Keith Sellar, who had advised that it was safe for the defendant to enter into the said agreement.

At the next board meeting on 21 January 1977, certain important decisions were taken. First, that the defendant was to enter into an agreement with the deceased to sell its fixed assets to the deceased subject to the approval of the DGI. Secondly, that the defendant was to enter into 'a long term lease agreement' with the nominees of the deceased for a lease of 'common properties' to him or them for a monthly rental of RM100 payable to the company. The proposed lessee was also to have the right to improve and develop the said properties. The effect of this was that the deceased or his family were immediately given possession of the said properties of the defendant ostensibly under a lease arrangement of indefinite duration with complete rights to develop the said properties for a meagre rental of RM100 per month. The said resolution also never identified

which of the 'company properties' were to be leased to the deceased or his nominees. All the same, the deceased's family immediately went into occupation of certain properties. A

Looking at the minutes of the board meetings of the defendant as a whole as well as the documentary evidence, it is my conclusion that the Siang Yong agreement (AB8) is essentially an agreement providing for an exchange of the properties of the defendant for the shares in the company, the former to go to the deceased and the latter to Siang Yong. If the agreement had gone through, it would mean that the deceased would have left the defendant, taking with him the entire assets and properties and the defendant would, in turn, be left high and dry and would remain as a shell company with only its insurance business to carry on. Fortunately, there was no evidence that the said agreement was performed in terms of the payment of the purchase money. The only evidence was that two Siang Yong directors were appointed to the board of the defendant on 1 December 1975. B C

From the above evidence, I hold that the deceased, together with the Ng family directors, had entered into a deceptive dealing with Siang Yong directors, and with their connivance had embarked upon a scheme to appropriate the assets of the defendant for the deceased himself in return for the sale of the Ng family shares in the defendant to the Siang Yong group. The parties went through the charade of board meetings in December 1975 to offer by way of a circular the sale of the assets to all the existing shareholders on the register as if it was open for anyone of them to make a bid. However, what the said circular (AB15) did not mention, and in a sense could not have mentioned, was that a day earlier, ie 7 December 1975, the deceased had already entered into an agreement with the Siang Yong group, the intended majority shareholders, to buy off the assets of the defendant for himself. In those circumstances, it thereafter became impossible for the deceased or for any director from the Ng family to act otherwise than to give effect to this basic understanding with the Siang Yong group. More significantly, it became impossible for them to act in the interests of the company as they were required to do by law, in all matters pertaining to the said sale of the assets and the related investigation by the DGI. D E F G

It must be remembered that at all material times, the deceased was the chairman of the defendant and some of his Ng family members were directors. The deceased was also the principal officer of the defendant. In law, the deceased and other directors of the defendant owe a fiduciary duty to the defendant and its shareholders and they are expected to exercise their powers and discretions for the benefit of the company at all times. In *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at p 137G; [1942] 1 All ER 378 at p 381, Viscount Sankey stated: H I

> The general rule of equity is that no one who had duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect.

In *Australian Growth Resources Corp Pty Ltd v Van Reesema* (1988) 13 ACLR 261, it was observed (at p 268):

> The relationship of a director to the company is fiduciary in character. The primary consequence of this principle is that a director is bound to exercise the powers and discretions conferred upon him bona fide in the interests of and for the benefit of the company as a whole: The exercise of a fiduciary power for a purpose beyond the legitimate scope of the power is invalid. The validity of the exercise of the powers of a director therefore depends upon the purpose of the exercise being for the benefit of the company as a whole.

On the law of directors who appropriate for themselves the business or property of the company, the Privy Council in *Cook v Deeks* [1916] 1 AC 554, per Lord Buckmaster LC (at p 563), observed as follows:

> But, on the other hand, men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent.

His Lordship further added (at p 564):

> In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the courts ...

Therefore, applying the above principles to the facts of this case, I am of the view that the deceased was in breach of his fiduciary duties as a director of the defendant whereby, with the connivance of the Ng family directors and the Siang Yong directors, he used the said agreement as a scheme or device to appropriate the assets of the defendant company to himself and for his own benefit.

I next turn to consider the banking transactions which the defendant's counsel described as round robin transactions by which money was paid into one account drawn out from another and paid back to the first, to show that on paper, a transaction had taken place when actually no money had passed. The defendant's account for 16 December 1975 showed that five cheques totalling RM164, 625.68 were drawn out (see AB 29). It also showed a credit entry of RM166,922 for the same day. Thus, the debit entry and the credit entry in the company account for the said day virtually cancelled each other out leaving the closing balance for the day at almost the same figure as the opening balance, in spite of a substantial transaction amounting to about RM166,000 having been carried out in the account on that day (see generally AB29). Exhibit 10 showed the corresponding entries for 16 December 1975 in the personal account of the deceased kept in the same branch. The said exhibit is an extract from the ledger card of the deceased's personal account showing the transactions for 16 December

1975. The following are the essential features to be noted of the said account:

(a) it was a current cum overdraft account with a temporary OD to the limit of RM3,000 up to 15 November 1975; and

(b) the ledger card notates that cheque Nos 456826–850 had been issued to the account holder to operate the account for the relevant period.

The following features may be noted of the transaction that took place in the deceased's personal account for the said day of 16 December (see exh D10):

(a) the opening balance for 16 December shows an overdrawn amount of RM702.21 in excess of the limit;

(b) the closing balance at the end of the day for 16 December shows the sum of RM502.47;

(c) however, within the day, two sums by way of cheques for RM150,125.68 and RM18,000 respectively were paid into the account, and a cheque for RM166,922 was drawn out from the account; and

(d) thus, like in the case of the company's account with the same branch for the said day, a substantial transaction had taken place in the personal account of the deceased for the day leaving at the end, the opening and closing balance in the account at almost the same figure.

The cheque for RM166,922 bears No 456846 which falls within the range of the cheques notated in exh D10 as having been issued out to the deceased to operate the account. Both the cheque number and the amount correspond with the payment purported to be made by the deceased as his 10% deposit to purchase the said properties vide his letter dated 15 December 1975 (see AB16). It may thus be concluded that the so-called 10% deposit paid by the deceased came out of this cheque drawn from his personal account at the Pudu branch. On the same day, as stated, the cheque deposit of two sums for RM150,125.68 and RM18,000 were paid into the deceased's said account.

The conclusion which can be made is that these cheques (AB17–18) drawn from the defendant's account in the form of bearer negotiable cheques had been paid into the personal account of the deceased (exh D10) to provide the funds to pay the deposit of RM166,922 to purchase the defendant's own properties. Exhibit D10 showed that the deceased's personal account did not otherwise have sufficient funds. Except for the hive of activity on 16 December 1975, the defendant's account was otherwise dormant and inactive. It is also clear that the deceased had utilized his personal account and the defendant's account, both of which were in the same branch of the bank, to engage in a round robin transaction.

Further, it is interesting to note the movement of the so-called deposit of RM166,922. The balance sheet of the defendant for the year ended 31 December 1975 (AB45) showed no record of this amount being received by the company. It was in fact never posted in the books. PW1

also confirmed that this amount was never reflected as money received by the defendant. On the other hand, the said sum was credited to the personal ledger account of the deceased with the defendant for 16 December 1975 (AB25). On the same day, two debit entries against the deceased were made, suggesting that these were borrowings by him. These were for the amounts of RM75,016 and RM14,500. For obvious reasons, the said sum of RM166,922 could not have been posted as a credit item in the books of the defendant because the accounts would not otherwise balance since an equal amount had been withdrawn from the defendant's funds. It was instead posted as a credit amount in the personal account of the deceased to reduce his borrowings from the defendant. In the circumstances, as at the end of 16 December 1975, the defendant would not be in credit for RM166,922 which should be the case if the said sum was a direct receipt by the defendant towards part-payment of the sale of the defendant's assets, and not as shown here, of the defendant funding the purchase of its own assets.

In coming to my conclusion on the round robin transactions, I have entirely relied on the entries in exh D10, the ledger card of the deceased's personal account. Be it noted that its admissibility was strenuously objected to by the plaintiff. However, for reasons which I had given during the trial, D10 was admitted and marked as the defendant's exhibit.

It will thus be seen from these documents that funds from the defendant's account were moved to the personal account of the deceased to enable the latter to issue out a cheque as a deposit sum, which was then paid back into the defendant's account so that at the end of the day, a circuitous transaction had taken place. In the result, all that was achieved was a paper transaction with no genuine credit or debit of the funds. It is also of particular interest to note that these transactions happened on the same day. The inference that could be drawn from these round robin transactions is that the deceased had, with the connivance of the Ng family directors, created paper entries in the defendant's account as if the said properties had been paid for. As pointed out earlier, funds from the defendant's account were paid into the personal account of the deceased to create the necessary fund to pay the deposit of RM166,922 which was then paid back into the defendant's account. This created a false transaction done solely to enable the deceased to issue his cheque MBB No 456846 for the same amount of RM166,922 drawn on his personal account, which in turn enabled the board of directors to have sight of the cheque physically and purported to accept it as the deposit payment at the board meeting on 20 December 1975.

In *Spedley Securities Ltd (In Liquidation) v Greater Pacific Investments Pty Ltd (In Liquidation)* (1992) 7 ACSR 155, the Supreme Court of NSW, Australia had occasion to consider a round robin transaction undertaken by the directors of a company to 'clean up' the balance sheet. In stating that the whole purpose of this transaction was to mask the true state of the company accounts, the court observed (at p 173(45–50)):

> *A director owes a duty to the company which he directs to act honestly and with a reasonable degree of care in the performance of his functions as a director.* Such

> a duty is imposed by the general law and by s 229 of the Companies (NSW) Code (see, for instance *Jeffree v National Companies & Securities Commission* (1989) 7 ACLC 556 at pp 560, 565 and cases there collected). *It is dishonest and a breach of such duty to seek to disguise the true state of accounts of a company. To do so misleads shareholders, creditors and regulatory authorities. The purpose of the round robins was thus a dishonest purpose and their implementation constituted a breach of fiduciary duty* ... . (Emphasis added.)

Although this was a decision of the court of first instance in Australia, I would adopt with gratitude the above statement of law.

Thus, arising from the evidence shown, the irresistible conclusion is that this round robin transaction involving the defendant's account and the deceased's personal account was devised by the deceased for an avowed purpose of deceiving the shareholders, ie to mask the true position of the defendant's account and to create paper entries in the account and give a picture that the said properties were being paid for. This constitutes a breach of fiduciary duty on the part of the deceased (*Spedley Securities*).

Therefore, having regard to the evidence and the circumstances of the case as a whole, I am satisfied that the evidence when taken together seems to me to be so compelling that, bearing in mind the high standard of proof required to prove fraud, the defendant has succeeded in showing to me the unconscionable and deceptive dealing of the deceased and the other directors of the Ng family relating to the purported purchase of the defendant's assets and properties under the said agreement. According to *Snell's Equity* (29th Ed, 1990), specific performance will be refused where the contract is tainted with fraud, or where the plaintiff has made some positive misrepresentation or has been guilty of fraudulent suppression or if the particulars or conditions for sale are misleading. On the facts and in the circumstances of this case, it is my judgment that the said agreement is, to say the least, tainted with fraud and is therefore void and unenforceable against the defendant. In the result, the plaintiff's claim for specific performance of the said agreement is dismissed with costs. Since the defendant has established a defence which impeached the validity of the said agreement (*Tamplin v James* (1880) 15 Ch D 215; [1874–80] All ER Rep 560), the plaintiff's alternative claim for damages in lieu of specific performance is also dismissed.

With respect to the counterclaim, having regard to my finding on the principal claim in the action, I rule that the plaintiff has no defence to the defendant's counterclaim. Accordingly, the defendant succeeds in its claim for the reliefs sought in the counterclaim. As the said agreement is declared void by this court, the defendant is entitled to immediate vacant possession of the said properties and for damages to be assessed by the registrar and costs of the counterclaim.

Order accordingly.

Reported by Anne Khoo